

Source: Legal > Federal Legal - U.S. > Circuit Court Cases - By Circuit > 11th Circuit - US Court of Appeals Cases
 Terms: (crow) and date is 12/2004 (Edit Search)

2004 U.S. App. LEXIS 26872, *; 18 Fla. L. Weekly Fed. C 116

IN RE: THOMAS **CROW**, JENNIFER **CROW**, Debtors. GEORGIA HIGHER EDUCATION ASSISTANCE CORP., GEORGIA STUDENT FINANCE COMMISSION, Plaintiffs-Appellants, versus THOMAS A. **CROW**, JENNIFER **CROW**, Defendants-Appellees.

No. 04-10369

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2004 U.S. App. LEXIS 26872; 18 Fla. L. Weekly Fed. C 116

December 23, 2004, Decided
December 23, 2004, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Southern District of Georgia. D. C. Docket No. 03-00136-CV-11 & BKCY No. 02-13181 BKC-JS.

DISPOSITION: Affirmed in part, vacated in part and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants, two state agencies, appealed a judgment of the United States District Court for the Southern District of Georgia, which affirmed a bankruptcy court's denial of the agencies' motion to dismiss in plaintiff debtors' adversary proceedings brought against the agencies pursuant to the debtors' filing of a Chapter 7 petition for bankruptcy relief. The bankruptcy court had dismissed a third claim of the debtors.

OVERVIEW: The debtors claimed that student loan obligations were dischargeable and sought damages because of the agencies' attempt to collect in violation of the automatic stay of 11 U.S.C.S. § 362(a). The district court held that the adversary proceedings were not barred by the Eleventh Amendment. On appeal, the court held that the dismissal of the claim that the loans were dischargeable was properly denied based on a prior case of the United States Supreme Court, which held that the seeking of discharge was an *in rem* proceeding that did not implicate the Eleventh Amendment. The court reversed as to the automatic stay claim after finding that Congress' attempt under 11 U.S.C.S. § 106(a) to abrogate Eleventh Amendment immunity in proceedings under 11 U.S.C.S. § 362 was an unconstitutional overreaching of its bankruptcy clause powers under U.S. Const. art. I, § 8, cl. 4. The bankruptcy court had no authority to entertain the *in personam* claim against the agencies absent sovereign consent. The court found that the provision could not be validated under U.S. Const. amend XIV, § 5 because Congress could not legislatively elevate bankruptcy to the constitutional status of a privilege or immunity.

OUTCOME: The court affirmed the district court's judgment as to the discharge claim and vacated the judgment as to the automatic stay claim. The court remanded with instructions for the district court to vacate the bankruptcy court's judgment entered in the automatic stay claim and to dismiss the claim.

CORE TERMS: immunity, abrogate, sovereign immunity, motion to dismiss, validly, state agencies, adversary proceeding, abrogation, abrogated, purported, asserting, enacting, bankruptcy proceedings, statutory right, bankruptcy law, valid exercise, state agency,

student loan, implicate, authorize, personam, remedial, invalid

LexisNexis(R) Headnotes • [Hide Headnotes](#)

[Bankruptcy Law > Creditor Claims & Objections > Governmental Claims > Sovereign Immunity](#) 

[Bankruptcy Law > Discharge](#) 

[Bankruptcy Law > Practice & Proceedings > Adversary Proceedings](#) 

[Bankruptcy Law > Practice & Proceedings > Jurisdiction](#) 

[Civil Procedure > State & Federal Interrelationships > Amendment 11](#) 

HN1  Despite the fact that current bankruptcy rules require a debtor to file an "adversary proceeding" against and serve a state agency to discharge student loan debt, such a proceeding does not implicate the Eleventh Amendment. A court's jurisdiction over a discharge of debt in bankruptcy is derived from its jurisdiction over the debtor's property, and that exercise of such in rem jurisdiction does not infringe state sovereignty. [More Like This Headnote](#)

[Bankruptcy Law > Creditor Claims & Objections > Governmental Claims > Sovereign Immunity](#) 

[Bankruptcy Law > Practice & Proceedings > Adversary Proceedings](#) 

[Bankruptcy Law > Practice & Proceedings > Jurisdiction](#) 

HN2  Where a debtor's claim seeks affirmative relief from the state through a coercive judicial process, the bankruptcy court's jurisdiction over it is premised on the persona of the state, not on the res of the debtor's property. [More Like This Headnote](#)

[Bankruptcy Law > Creditor Claims & Objections > Governmental Claims > Sovereign Immunity](#) 

[Bankruptcy Law > Practice & Proceedings > Adversary Proceedings](#) 

[Civil Procedure > State & Federal Interrelationships > Amendment 11](#) 

[Constitutional Law > State Autonomy](#) 

HN3  The United States Court of Appeals for the Eleventh Circuit has joined with five of the six circuits in holding that [11 U.S.C.S. § 106\(a\)](#)'s purported abrogation of Eleventh Amendment immunity in bankruptcy proceedings, which is clear and specific, is nonetheless invalid. [More Like This Headnote](#)

[Bankruptcy Law > Automatic Stay](#) 

[Bankruptcy Law > Creditor Claims & Objections > Governmental Claims > Sovereign Immunity](#) 

[Civil Procedure > State & Federal Interrelationships > Amendment 11](#) 

[Constitutional Law > State Autonomy](#) 

[Governments > State & Territorial Governments > Claims By & Against](#) 

HN4  The federal courts, including the bankruptcy courts, have no authority to entertain a claim under [11 U.S.C.S. § 362](#) claim against state agencies absent that sovereign's consent. [More Like This Headnote](#)

[Civil Procedure > State & Federal Interrelationships > Amendment 11](#) 

[Constitutional Law > State Autonomy](#) 

[Governments > State & Territorial Governments > Claims By & Against](#) 

HNS  See U.S. Const. amend XI.

[Civil Procedure > State & Federal Interrelationships > Amendment 11](#) 

[Constitutional Law > State Autonomy](#) 

[Governments > State & Territorial Governments > Claims By & Against](#) 

HN6  Under U.S. Const. amend XI, a state is immune from suit by private parties in federal court absent a valid abrogation of its immunity by Congress or an express waiver by the state. [More Like This Headnote](#)

[Civil Procedure > State & Federal Interrelationships > Amendment 11](#)

[Constitutional Law > State Autonomy](#)

HN7 Congress successfully abrogates a state's Eleventh Amendment immunity only where two requirements are met. Congress must unequivocally express an intent to abrogate state immunity, and its legislative action must be pursuant to a valid exercise of power. Congress' intent to abrogate the States' immunity from suit must be obvious from a clear legislative statement. [More Like This Headnote](#)

[Constitutional Law > Congressional Duties & Powers > Bankruptcy Clause](#)

HN8 See U.S. Const. art. I, § 8, cl. 4.

[Civil Procedure > State & Federal Interrelationships > Amendment 11](#)

[Constitutional Law > Congressional Duties & Powers > Bankruptcy Clause](#)

[Constitutional Law > State Autonomy](#)

HN9 Congress may not abrogate state sovereign immunity by legislation passed pursuant to its bankruptcy powers under U.S. Const. art. I, § 8, cl.

4. [More Like This Headnote](#)

[Civil Procedure > State & Federal Interrelationships > Amendment 11](#)

[Constitutional Law > State Autonomy](#)

[Constitutional Law > The Judiciary > Congressional Limits](#)

HN10 The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. [More Like This Headnote](#)

[Constitutional Law > Substantive Due Process > Privileges & Immunities](#)

[Constitutional Law > Substantive Due Process > Scope of Protection](#)

HN11 See U.S. Const. amend. XIV, § 5.

[Constitutional Law > Substantive Due Process > Privileges & Immunities](#)

[Constitutional Law > Substantive Due Process > Scope of Protection](#)

HN12 U.S. Const. amend. XIV, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment. However, Congress may pass only "appropriate" legislation under § 5, and must exercise its power in a "remedial" manner. Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by Supreme Court case law. [More Like This Headnote](#)

[Constitutional Law > Substantive Due Process > Privileges & Immunities](#)

[Constitutional Law > Substantive Due Process > Scope of Protection](#)

[Governments > Legislation > Interpretation](#)

HN13 Courts should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment. Although it need not recite the words "§ 5" or "Fourteenth Amendment" to enact laws pursuant to U.S. Const. amend. XIV, § 5, to invoke § 5, Congress must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct. [More Like This Headnote](#)

[Constitutional Law > Substantive Due Process > Privileges & Immunities](#)

[Constitutional Law > Substantive Due Process > Scope of Protection](#)

[Governments](#) > [Legislation](#) > [Interpretation](#) 

HN14 A federal court will not presume that Congress intended to enact a law under a general Fourteenth Amendment power to remedy an unspecified violation of rights when a specific, substantive Article I power clearly enabled the law. [More Like This Headnote](#) 

[Bankruptcy Law](#) > [Creditor Claims & Objections](#) > [Governmental Claims](#) > [Sovereign Immunity](#) 

[Bankruptcy Law](#) > [Discharge](#) 

[Constitutional Law](#) > [Substantive Due Process](#) > [Privileges & Immunities](#) 

HN15 Even if Congress has purported to pass 11 U.S.C.S. § 106(a) pursuant to its power under U.S. Const. amend XIV, § 5, it can not validly do so because conferring a statutory right to bankruptcy does not enforce the Privileges & Immunities Clause of the Fourteenth Amendment. The United States Supreme Court has expressly held that there is no constitutional right to a bankruptcy discharge, and § 5 does not authorize Congress to create new constitutional rights. It follows that Congress can not legislatively elevate bankruptcy to the constitutional status of a privilege or immunity. In addition, bankruptcy bears no resemblance to any of the rights the Supreme Court has defined as privileges and immunities. [More Like This Headnote](#)

[Bankruptcy Law](#) > [Creditor Claims & Objections](#) > [Governmental Claims](#) > [Sovereign Immunity](#) 

[Civil Procedure](#) > [State & Federal Interrelationships](#) > [Amendment 11](#) 

[Constitutional Law](#) > [State Autonomy](#) 

[Constitutional Law](#) > [Substantive Due Process](#) > [Privileges & Immunities](#) 

HN16 Because Congress may not abrogate state sovereign immunity pursuant to its powers under U.S. Const. art. I, its Bankruptcy Clause powers, and because 11 U.S.C.S. § 106(a) has not been validly enacted pursuant to its powers under U.S. Const. amend. XIV, § 5, Congress' attempt to take from states in *in personam* bankruptcy cases the protection that the Eleventh Amendment provides them is invalid. [More Like This Headnote](#)

COUNSEL: For Georgia Higher Education Assistance Corp., Georgia Student Finance Commission, Appellants: Oscar B. Fears, III., Office of the State of Georgia Attorney General, Atlanta, GA

For Thomas A. **Crow**, Jennifer **Crow**, Appellees: Todd Boudreaux Shepard, Plunkett, Hamilton, Boudreaux & Tisdale, LLP, Evans, GA.

JUDGES: Before ANDERSON and WILSON, Circuit Judges, and JORDAN *, District Judge.

* Honorable Adalberto Jordan, United States District Judge for the Southern District of Florida, sitting by designation.

OPINION:

PER CURIAM:

This appeal requires us to apply the Supreme Court's recent decision in Tennessee Student Assistance Corporation v. Hood, 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004), to two claims brought by a debtor in bankruptcy against two agencies of the State of Georgia. Although Hood disposes of the first of those claims, it does not affect the second one. As to that claim we must decide whether Congress' attempt in 11 U.S.C. § 106(a) to abrogate states' Eleventh Amendment immunity is valid. For the reasons that follow, we believe that it

is not.

Thomas and Jennifer **Crow** filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. In the course of the proceeding, they filed a complaint in the bankruptcy court against the Georgia Higher Education **[*2]** Assistance Corporation and the Georgia Student Finance Commission, two state agencies. The complaint contained three counts. Count one sought a determination that Thomas **Crow's** outstanding student loan obligations to these two state agencies were dischargeable. Count two sought damages from the agencies for their attempts to collect from the **Crows** after receiving notice of the Chapter 7 filing. Count three sought damages from them for their alleged violation of the Fair Debt Collection Practices Act.

The defendant state agencies filed a motion to dismiss, asserting that the adversary proceeding was barred by their Eleventh Amendment immunity. The bankruptcy court granted the motion as to count three, but denied it as to the first two counts after concluding that in 11 U.S.C. § 106(a) Congress had validly abrogated state sovereign immunity as expressed in the Eleventh Amendment. The agencies appealed the bankruptcy court's denial of their motion to dismiss to the district court, which affirmed. The agencies then appealed to us, asserting the Eleventh Amendment as a bar to the adversary proceeding.

In the meantime, the Supreme Court issued its decision in **[*3]** Tennessee Student Assistance Corporation v. Hood, 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004). In that case Pamela Hood instituted a Chapter 7 proceeding during which she filed and served a complaint in the bankruptcy court against the Tennessee Student Assistance Corporation, a state agency. Id. at ___, 124 S. Ct. at 1908-09. Her complaint sought discharge of her student loans. Id. The agency filed a motion to dismiss asserting Eleventh Amendment immunity. Id. at ___, 124 S. Ct. at 1909. The motion was denied, and the denial was affirmed by the Sixth Circuit. 319 F.3d 755, 767-68 (6th Cir. 2003).

The Supreme Court affirmed, but it did so without reaching the issue of whether the Bankruptcy Clause of the Constitution authorizes Congress to abrogate the Eleventh Amendment immunity of states. Instead, the Supreme Court held that, ^{HN1} despite the fact that current bankruptcy rules require a debtor to file an "adversary proceeding" against and serve a state agency to discharge student loan debt, such a proceeding does not implicate the Eleventh Amendment. Hood, 541 U.S. at ___, 124 S. Ct. at 1909-15. **[*4]** The Court reasoned that a court's jurisdiction over a discharge of debt in bankruptcy is derived from its jurisdiction over the debtor's property, and that exercise of such *in rem* jurisdiction does not infringe state sovereignty. Id. at ___, 124 S. Ct. at 1911-13.

Hood is all we need to know in order to resolve the issue involving the denial of the motion to dismiss count one in this case, the count that sought discharge of the debt. Under Hood, the Eleventh Amendment is not implicated, and we therefore affirm the denial of the motion to dismiss that count.

The denial of the motion to dismiss count two, however, raises issues that go beyond the Hood decision. Count two sought a declaration that the defendant state agencies had violated 11 U.S.C. § 362(a) by trying to collect on **Crow's** debts, and monetary damages pursuant to § 362(h) for that violation. ^{HN2} Because count two seeks affirmative relief from the state through a coercive judicial process, the bankruptcy court's jurisdiction over it is premised on the *persona* of the state, not on the *res* of the debtor's property. See Hood, 541 U.S. at ___, 124 S. Ct. at 1912. **[*5]** Because jurisdiction is *in personam*, Eleventh Amendment concerns are not obviated by Hood. As a result, we must determine whether Congress' attempt in 11 U.S.C. § 106(a) to abrogate Eleventh Amendment immunity in proceedings brought pursuant to § 362 is constitutional.

For reasons we will explain, today ^{HN3} we join five of the six circuits that have considered the issue in holding that § 106(a)'s purported abrogation of Eleventh Amendment immunity in bankruptcy proceedings, which is clear and specific, is nonetheless invalid in light of the Supreme Court's decision in Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). See Nelson v. La Crosse County Dist. Attorney, 301 F.3d 820, 832 (7th Cir. 2002); Mitchell v. Franchise Tax Bd., 209 F.3d 1111, 1121 (9th Cir. 2000); Sacred Heart Hosp. of Norristown v. Pennsylvania, 133 F.3d 237, 243 (3d Cir. 1998); Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co., 123 F.3d 241, 243 (5th Cir. 1997), amended by 130 F.3d 1138, 1139 (5th Cir. 1997); Schlossberg v. Maryland, 119 F.3d 1140, 1145-47 (4th Cir. 1997). ^[*6] n1 But see Hood v. Tenn. Student Assistance Corp., 319 F.3d 755, 767-68 (6th Cir. 2003), affirmed on other grounds, 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004). It follows that ^{HN4} the federal courts, including the bankruptcy courts, have no authority to entertain a § 362 claim against two agencies of the State of Georgia absent that sovereign's consent, see Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464, 65 S. Ct. 347, 351, 89 L. Ed. 389 (1945), overruled on other grounds, 535 U.S. 613, 623, 122 S. Ct. 1640, 1646, 152 L. Ed. 2d 806 (2002), and it has not consented.

----- Footnotes -----

n1 Though many of those decisions decided this issue in the context of an adversary proceeding to discharge debt - which Hood has since informed us does not implicate the Eleventh Amendment - the reasoning is nonetheless persuasive on the overarching question of whether Congress may abrogate Eleventh Amendment immunity in bankruptcy proceedings.

----- End Footnotes -----

The Eleventh Amendment ^[*7] provides:

^{HN5} The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. ^{HN6} Under this constitutional provision, a state is immune from suit by private parties in federal court absent a valid abrogation of its immunity by Congress or an express waiver by the state. See, e.g., College Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 144 L. Ed. 2d 605, 527 U.S. 666, 669-70, 119 S. Ct. 2219, 2223 (1999). Georgia not having waived its rights, the sole issue is whether Congress validly abrogated state sovereign immunity in 11 U.S.C. § 106(a).

^{HN7} Congress successfully abrogates a state's Eleventh Amendment immunity only where two requirements are met. Congress must unequivocally express an intent to abrogate state immunity, and its legislative action must be "pursuant to a valid exercise of power." Green v. Mansour, 474 U.S. 64, 68, 106 S. Ct. 423, 425-26, 88 L. Ed. 2d 371 (1985). "Congress' intent to abrogate ^[*8] the States' immunity from suit must be obvious from 'a clear legislative statement.'" Seminole Tribe, 517 U.S. at 55, 116 S. Ct. at 1123. That is no problem in this case. Congress clearly stated its intent to abrogate state sovereign immunity

in § 106(a), which provides in relevant part: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit" with respect to claims brought pursuant to 11 U.S.C. § 362.

The issue, then, is whether Congress' enactment of § 106(a) was "pursuant to a valid exercise of power." The **Crows** contend that Congress had the power to abrogate state sovereign immunity in enacting § 106(a) pursuant to its Article I bankruptcy power, under which ^{HN8} "Congress shall have power . . . To establish . . . uniform laws on the subject of Bankruptcies throughout the United States . . ." Art. I., § 8, cl. 4. However, in Seminole Tribe the Supreme Court held that ^{HN9} "Congress may not abrogate state sovereign immunity by legislation passed pursuant to its Article I powers. 517 U.S. at 72-73, 116 S. Ct. at 1131-32.

The **Crows** read Seminole Tribe narrowly, and would [*9] restrict the reach of the decision to the Article I powers that were involved in Seminole Tribe itself, which are the ones flowing from the Indian and Interstate Commerce Clauses. Under the **Crows'** theory those powers are positively less potent for present purposes than Congress' Bankruptcy Clause power, because those other powers do not stem from a source that contains a uniformity requirement as the Bankruptcy Clause does. That theory, however, runs counter to the Supreme Court's sharp statement in Seminole Tribe that ^{HN10} "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 517 U.S. at 72-73, 116 S. Ct. at 1131-32. The Court did not qualify its emphatic statement that Article I cannot be used to get around the Eleventh Amendment, and we decline to do so here, because the Supreme Court has reiterated in a number of cases since then that "Seminole Tribe makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers." Florida Prepaid, 527 U.S. at 666, 119 S. Ct. at 2225; see also [*10] Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 364, 121 S. Ct. 955, 962, 148 L. Ed. 2d 866 (2001) ("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 79, 120 S. Ct. 631, 643, 145 L. Ed. 2d 522 (2000) ("Under our firmly established precedent then, if the ADEA rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers.").

Although Seminole Tribe has closed the Article I abrogation avenue, Congress may still abrogate Eleventh Amendment immunity pursuant to § 5 of the Fourteenth Amendment, which provides that ^{HN11} "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." 517 U.S. at 59, 116 S. Ct. at 1125. The **Crows'** final argument is that Congress enacted § 106(a) pursuant to § 5 of the Fourteenth Amendment, because bankruptcy is a privilege or immunity under § 1 of the Fourteenth Amendment, meaning Congress could use § 5 to enforce § 1 and in that manner abrogate [*11] state sovereign immunity. We disagree.

"Correctly viewed, ^{HN12} § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach v. Morgan, 384 U.S. 641, 651, 86 S. Ct. 1717, 1723-24, 16 L. Ed. 2d 828 (1966). However, Congress may pass only "appropriate" legislation under § 5, and must exercise its power in a "remedial" manner. Florida Prepaid, 527 U.S. at 667-68, 119 S. Ct. at 2226. "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by [Supreme Court] case law." City of Boerne v. Flores, 521 U.S. 507, 527, 117 S. Ct. 2157, 2167, 138 L. Ed. 2d 624 (1997).

^{HN13} Courts "should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Pennhurst State Sch. & Hosp. v.

Halderman, 451 U.S. 1, 16, 101 S. Ct. 1531, 1539, 67 L. Ed. 2d 694 (1981). Although it need not "recite the words 'section 5' or 'Fourteenth Amendment'" to enact laws pursuant to § 5, E.E.O.C. v. Wyoming, 460 U.S. 226, 243 n.18, 103 S. Ct. 1054, 1064 n.18, 75 L. Ed. 2d 18 (1983). [*12] "to invoke § 5, [Congress] must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct," Florida Prepaid, 527 U.S. at 669, 119 S. Ct. at 2227. In light of this standard, the **Crows'** § 5 argument fails on three separate grounds.

First, Congress gave no indication that it enacted § 106(a) pursuant to anything other than its Article I bankruptcy power. See Sacred Heart, 133 F.3d at 244; PNL Asset Mgmt., 123 F.3d at 245; Schlossberg, 119 F.3d at 1146. As the Third Circuit put it:

The conclusion seems logically inescapable that in passing the 1994 Act Congress exercised the same specifically enumerated Article I bankruptcy power that it has traditionally relied on in enacting prior incarnations of the bankruptcy law dating back to 1800 - 68 years before the passage of the Fourteenth Amendment. ^{HN14}
We will not presume that Congress intended to enact a law under a general Fourteenth Amendment power to remedy an unspecified violation of rights when a specific, substantive Article I power clearly enabled the law. [*13]

Schlossberg, 119 F.3d at 1146 (internal citation omitted).

Second, ^{HN15} even if Congress had purported to pass § 106(a) pursuant to its § 5 power, it could not validly do so because conferring a statutory right to bankruptcy does not enforce the Privileges & Immunities Clause of the Fourteenth Amendment. The Supreme Court has expressly held that there is no constitutional right to a bankruptcy discharge, United States v. Kras, 409 U.S. 434, 446-47, 93 S. Ct. 631, 638-39, 34 L. Ed. 2d 626 (1973), and § 5 does not authorize Congress to create new constitutional rights, Downing v. Bd. of Tr. of Univ. of Ala., 321 F.3d 1017, 1021 (11th Cir. 2003). It follows that Congress could not legislatively elevate bankruptcy to the constitutional status of a privilege or immunity. In addition, bankruptcy bears no resemblance to any of the rights the Supreme Court has defined as privileges and immunities, see Twining v. New Jersey, 211 U.S. 78, 97, 29 S. Ct. 14, 19, 53 L. Ed. 97 (1908) (enumerating the rights protected by the privileges and immunities clause), and in any event only one of those rights, the right to travel, [*14] has been used to strike down a law in the last 70 years. See Saenz v. Roe, 526 U.S. 489, 511, 119 S. Ct. 1518, 1530, 143 L. Ed. 2d 689 (1999) (Rehnquist, J., dissenting).

If bankruptcy, a statutorily-conferred, non-constitutional right, were deemed a privilege or immunity, any statutory right Congress created would be a privilege or immunity, and Congress could use any exercise of Article I power to abrogate state sovereign immunity by claiming to act under § 5 of the Fourteenth Amendment. This would fly in the face of Seminole Tribe. See Sacred Heart, 133 F.3d at 244-45 (rejecting contention that bankruptcy is a privilege or immunity); see also Schlossberg, 119 F.3d at 1146-47 ("If the Fourteenth Amendment is held to apply so broadly as to justify Congress' enactment of the Bankruptcy Code as a requirement of due process, then the same argument would justify every federal enforcement scheme as a requirement of due process under the Fourteenth Amendment."); Mitchell, 209 F.3d at 1119 (rejecting a theory that § 106(a) could have validly abrogated sovereign immunity under the Due Process Clause of the Fourteenth Amendment [*15]); PNL Asset Mgmt., 123 F.3d at 245 (to allow Congress to abrogate sovereign immunity by determining that § 106(a) was passed pursuant to § 5 would "render Eleventh Amendment

state sovereign immunity meaningless and eviscerate the fundamental construct of federalism in our constitutional form of government".

Finally, even if Congress had purported to act under § 5 of the Fourteenth Amendment, and even if Congress otherwise could have done so, in enacting § 106(a) of the Bankruptcy Code Congress did not identify any pattern of state conduct violating bankruptcy law or any provision of the Fourteenth Amendment, as required by the Supreme Court in Florida Prepaid, 527 U.S. at 670, 119 S. Ct. at 2227. See H.R. Rep. No. 95-595 (1977), reprinted in 1978 U.S.C.C.A.N. 5963; H.R. Rep. No. 103-835, at 42 (1994); see also Mitchell, 209 F.3d at 1119-20. It follows that the enactment of § 106(a) was not remedial in the requisite sense and was not an appropriate exercise of its § 5 powers. See Florida Prepaid, 527 U.S. at 667-68, 119 S. Ct. at 2226; see also City of Boerne, 521 U.S. at 519, 117 S. Ct. at 2163-64. **[*16]** As a result, § 106(a) did not validly abrogate the Eleventh Amendment.

HN16 Because Congress may not abrogate state sovereign immunity pursuant to its Article I Bankruptcy Clause powers, and because § 106(a) was not validly enacted pursuant to its powers under § 5 of the Fourteenth Amendment, Congress' attempt to take from states in *in personam* bankruptcy cases the protection that the Eleventh Amendment provides them is invalid. For that reason, the bankruptcy court and the district court should have granted the motion to dismiss filed by the state agencies as to count two in this case. See Ford, 323 U.S. at 464, 65 S. Ct. at 351.

The judgment of the district court as to count one is AFFIRMED. Its judgment as to count two is VACATED, and the case is REMANDED with instructions for the district court to vacate the judgment of the bankruptcy court as to count two, which is due to be dismissed.

Source: [Legal > Federal Legal - U.S. > Circuit Court Cases - By Circuit > 11th Circuit - US Court of Appeals Cases](#) **[1]**

Terms: **(crow) and date is 12/2004** [\(Edit Search\)](#)

View: Full

Date/Time: Tuesday, January 18, 2005 - 10:32 AM EST

[About LexisNexis](#) | [Terms and Conditions](#)

Copyright © 2005 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
C.A. NO. SUC93-00977-D

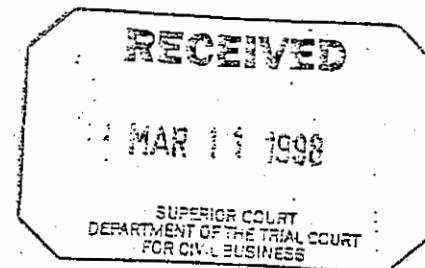
G. HOWARD HAYES, Individually,
and as Trustee of the MASHPEE
SELF-STORAGE NOMINEE TRUST;
J. BRUCE MACGREGOR; AND ROGER P.
WILLIAMS,

Plaintiffs

v.

PAUL J. WOODS, Individually
and as Trustee of the STEPHEN-
PAMELA REALTY TRUST, THE UNITED
STATES, DEPARTMENT OF INTERNAL
REVENUE SERVICE, THE DEPARTMENT
OF REVENUE OF THE COMMONWEALTH
OF MASSACHUSETTS,

Defendants



JOINT MOTION FOR RELEASE OF FUNDS

Three parties¹ jointly request this court to release funds to them which are currently held by this court since deposit of escrow funds on March 2, 1993. The parties have a judgment from the Appeals Court for the Commonwealth of Massachusetts, Case No. 96-P-948, which vacates the April 4, 1995 judgment of Suffolk Superior Court and enters a new judgment. The Appeals Court judgment declares that the attorney's lien of Stephen V. Murphy has priority to the Notices of

1. The parties are the Commonwealth of Massachusetts Department of Revenue, Michael J. Markoff ("Markoff") and Stephen V. Murphy ("Murphy"), the attorneys who represented the defendant, Paul J. Woods, in the underlying Barnstable District Court Collection action. Both Murphy and Markoff intervened in this action on July 20, 1993.

Massachusetts Tax Lien of the Department of Revenue for the Commonwealth of Massachusetts and is in an amount covering Stephen V. Murphy's fees and expenses, including the amount he incurred by retaining Attorney Michael J. Markoff. No appeals have been taken from the Appeals Court judgment.

On August 1, 1994, this court ordered the distribution of \$74,363.41 from the Court-held fund to the other defendant in this action, the United States, in full satisfaction of any and all claims of the United States to said fund.

As of February 28, 1998, the amount owed to each of the parties, reflecting the accrual of interest to defendants Stephen V. Murphy and Michael J. Markoff at the rate of ten percent (10%) per annum from the June 30, 1992 settlement of the underlying Barnstable District Court action, is as follows:

<u>AWARD</u>	<u>INTEREST FROM 6/30/92 THROUGH 6/30/97</u>	<u>INTEREST FROM 7/1/97 THROUGH 3/31/98</u>	<u>TOTAL DUE THROUGH 3/31/98</u>	
STEPHEN V. MURPHY:	\$ 5,886.75	\$ 2,943.37	\$ 441.45	\$ 9,271.57
MICHAEL J. MARKOFF	13,847.50	6,937.75	1,038.60	21,823.85

MASSACHUSETTS DEPARTMENT OF REVENUE: BALANCE OF COURT-HELD FUND AFTER PAYMENTS TO STEPHEN V. MURPHY AND MICHAEL J. MARKOFF.

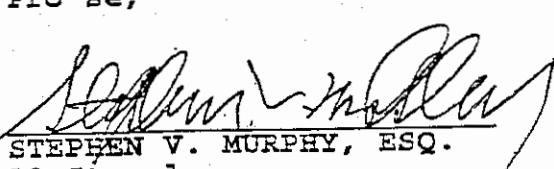
The parties also request that if the payment of the court-held fund is made after March 31, 1998, interest accruing after that date shall be calculated by the clerk of the Court at the rate and in the manner applicable to post-judgment interest.

Accordingly, the moving parties request this Court to order the distribution of the fund held in this action.

Respectfully submitted,

STEPHEN V. MURPHY,

Pro se,


STEPHEN V. MURPHY, ESQ.
13 Steeple
Post Office Box 247
Mashpee, MA 02649

MICHAEL J. MARKOFF

Pro se,


MICHAEL J. MARKOFF, ESQ.
184 Jones Road
Post Office Box 212
Falmouth, MA 02541-0212

MITCHELL ADAMS
COMMISSIONER OF REVENUE
COMMONWEALTH OF MASSACHUSETTS

By his attorney,


EILEEN RYAN MCAULIFFE
Counsel to the Commissioner
Department of Revenue
Litigation Bureau, Room 808
P.O. Box 9688
100 Cambridge Street
Boston, Massachusetts 02114
(617) 626-3217

4382/ERM

COMMONWEALTH OF MASSACHUSETTS
 SUFFOLK SUPERIOR COURT
 PUBLIC CIVIL DOCKET & HISTORY

SUCV93-00977

As of 06/12/96

Hayes et al v Woods et al

LE/RTRN DATE 02/16/93
 STATUS DATE 04/28/95
 CASE ORIGIN 1
 LEAD CASE

CASE STATUS dappn Disposd: appeal pending
 SESSION D Civil D
 CASE TYPE D99 Misc equitable remedy
 TRACK F JURY n

----- Tracking Deadlines -----

SERVICE 05/17/93	ANSWER 07/16/93	RULE 12/19/20 07/16/93
RULE 15 07/16/93	DISCOVERY 12/13/93	RULE 56 01/12/94
FINAL PTC 02/11/94	DISPOSITION 04/12/94	

ntiff
 r P Williams
 ve 02/16/93

Private Counsel 558826
 Maureen E Curran
 Conn, Kavanaugh, Rosenthal & Peisch
 10 Post Office Square
 4th floor
 Boston MA 02109
 Phone: 617-482-8200
 Fax: 617-482-6444
 Active 06/03/94 Notify

Private Counsel 561590A
 Thomas E Kenney
 Pierce & Mandell
 1 Beacon Street
 13th floor
 Boston MA 02108
 Phone: 617-720-2444
 Fax: 617-367-1363
 Active 08/16/93 Notify

Private Counsel 393260
 Thomas E Peisch
 Conn, Kavanaugh, Rosenthal & Peisch
 10 Post Office Square
 4th floor
 Boston MA 02109
 Phone: 617-482-8200
 Fax: 617-482-6444
 Active 08/12/93 Notify

Private Counsel 550933
 Therese M LaRusso
 Conn, Kavanaugh, Rosenthal & Peisch
 10 Post Office Square

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT
PUBLIC CIVIL DOCKET & HISTORY

SUCV93-00977

As of 06/12/96

Hayes et al v Woods et al

Page 2

4th floor
Boston MA 02109
Phone: 617-482-8200
Fax: 617-482-6444
Withdrawn 08/16/93

intiff
ruce MacGregor
ive 02/16/93

See above.
See above.
See above.
See above.

intiff
oward Hayes, Trustee
hpee Self-Storage Nominee Tr
ive 02/16/93

See above.
See above.
See above.
See above.

intiff
oward Hayes
ive 02/16/93

See above.
See above.
See above.
See above.

endant
t of Revenue of Comm of Mass
ved: 02/24/93
wered: 03/31/93
wered 03/31/93

Private Counsel 548131
Salvatore M Giorlandino
Mass Atty General's Office
1 Ashburton Place
Room 2019
Boston MA 02108 1698
Phone: 617-727-2200 2092
Fax: 617-727-3251
Active 05/15/95 Notify

Private Counsel 435260
Eileen Ryan McAuliffe
Mass Revenue Dept
100 Cambridge Street
Room 808 - Legal Dept
Boston MA 02204 7068
Phone: 617-727-7150
Active 03/22/93 Notify

endant
Internal Revenue Service
ved: 02/24/93
wered: 03/31/93
wered 03/31/93

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT
PUBLIC CIVIL DOCKET & HISTORY

SUCV93-00977

As of 06/12/96

Hayes et al v Woods et al

Page 3

endant

11 J Woods Trustee

Stephen-Pamela Realty Trust

Answered: 05/20/93

Answered 05/20/93

Private Counsel 547590
Michael J Markoff
PO Box 212
Falmouth MA 02541 0212
Phone: 508-548-5500
Fax: 508-548-5520
Active 05/20/93 Notify

Defendant

11 J Woods

Answered: 05/20/93

Answered 05/20/93

See above.

Defendant/intervenor

Stephen V Murphy

Box 247

Shppee MA 02649

#363840

Answered 07/20/93

See above.

Defendant/intervenor

Michael J Markoff

Box 212

Falmouth MA 02541

#547590

Answered 07/20/93

See above.

as plaintiff name

Stephen Self-Storage Nominee Trustee

Answered 02/16/93

See above.

See above.

See above.

See above.

as defendant name

Stephen-Pamela Realty Trust

Answered 02/16/93

* * * D O C K E T * * *

E PAPER ENTRY

16/93 1.0 Complaint
16/93 Origin 1, Type D99, Track F.
16/93 2.0 Civil action cover sheet re: complaint
01/93 3.0 Motion of plaintiffs to deposit funds into court
02/93 Motion (P#3) allowed (Peter M Lauriat, Justice) Notice sent
3/4/93

COMMONWEALTH OF MASSACHUSETTS
 SUFFOLK SUPERIOR COURT
 PUBLIC CIVIL DOCKET & HISTORY

SUCV93-00977

As of 06/12/96

Hayes et al v Woods et al

Page 4

* * * D O C K E T * * * *

DATE PAPER ENTRY

3/02/93 4.0 ORDER: It is hereby ordered that the plffs. shall deposit the funds, which are the subject of the current interpleader action, and which are currently being held in an interest bearing account immediately upon receipt of this order. Additionally, the plffs. shall continue to pay the monthly payments into court pursuant to the settlement agreement in the companion action, Wood v Hayes, C.A. 90-2520 Barnstable Superior Court. (Lauriat, J.). Notice sent 3/4/93

3/24/93 5.0 SERVC RETRND: US Dept of Internal Revenue Ser (Defendant) By giving in hand to Paula Winn, at U.S. Atty's. Office 2/18/93

3/24/93 6.0 SERVC RETRND: Dept of Revenue of Comm of Mass (Defendant) By giving in hand to Ms. M. Damour 2/18/94

3/24/93 7.0 SERVC RETRND (summons): Attorney General by giving in hand to Sandra McDonald 2/18/93

3/12/93 \$174,218.33 pd in to Court.

3/31/93 8.0 ANSWER of deft Commonwealth of Mass Commissiner or Revenue \$3041.46 paid into Court.

4/09/93 8.1 ANSWER: US Internal Revenue Service \$2498.36 paid into Court.

4/10/93 9.0 ANSWER: Paul J Woods Indiv & Trustee Case status changed to "Needs review for answers" at service deadline review \$2715.55 paid into Court.

4/12/93 \$2868.74 paid into Court.

4/20/93 10.0 Motion of Michael J Markoff & Stephen V Murphy to intervene as party defts - Allowed, (White, J) Notice sent 7/26/93

4/20/93 11.0 ANSWER of defts/Intervenors Michael J Markoff & Stephen V Murphy Filed by leave of court (White, J) Case status changed to "Needs discovery" at answer deadline review \$2914.78 paid into Court.

4/02/93 \$2895.68 paid into Court.

4/04/93 \$3025.11 paid into Court.

4/08/93 \$3041.46 paid into Court.

4/05/94 \$3,027.00 paid into Court.

4/02/94 \$3,041.46 paid into Court.

4/07/94 \$3,027.14 paid into Court.

4/19/94 \$3041.46 paid into Court.

4/05/94 \$3041.46 paid into Court.

4/26/94 12.0 Stipulation for the entry of an order of distribution ato the Uniated States

COMMONWEALTH OF MASSACHUSETTS
 SUFFOLK SUPERIOR COURT
 PUBLIC CIVIL DOCKET & HISTORY

SUCV93-00977

As of 06/12/96

Hayes et al v Woods et al

Page 5

* * * DOCKET * * *

PAPER ENTRY

3/94 13.0 Joint motion of all active parties to continue pretrial conference scheduled for June 21, 1994 (w/o opposition)

3/94 Motion (P#13) Allowed (White, J) notice sent 6/29/94

8/94 13.1 ORDER: The Clerk of the Court is directed to pay the sum of \$74,363.41 to the United States forthwith from the fund relating to the above-captioned case and held in the Registry of the Court, with interest thereon from and after May 1, 1994 as set forth in said stipulation (White, J) Notice sent 6/29/94

3/94 14.0 Motion of intervenor def Michael J Markoff & Stephen V Murphy for Summary Judgment with opposition

3/94 15.0 Motion of Commissioner of Revenue for Summary Judgment with opposition

1/94 \$2878.66 paid into Court.

0/94 \$76,361.73 paid to The United States of America.

6/94 \$2,937.41 paid into Court.

7/94 16.0 Agreed upon statement of facts

8/94 \$3041.46 paid into Court.

8/94 \$3041.46 paid into Court.

2/94 \$2899.67 paid into Court.

7/94 \$3041.46 paid into Court.

6/95 \$3041.46 paid into Court.

1/95 \$3041.46 paid into Court.

4/95 17.0 ORDER AND JUDGMENT Commissioner of Revenue's Motion for Summary Judgment is ALLOWED. There is no Massachusetts law cited to the Court on the question of the priority between a tax lien and an atty lien. The court determines that priority should be based on whichever lien arose first; here it is the tax lien. See Mass. G.L. c62C s 50(a) ("The lien shall arise at the time the assessment is made or deemed to be made and shall continue until the liability for the amount assessed deemed to be assessed is satisfied"). The tax lien arose before the services of the Intervenor-Deft Markoff and Murphy were engaged. Judgment is to enter declaring the priority of the Massachusetts Tax Lien. SO ORDERED (Roseman, J) entered on docket pursuant to Mass. R. Civ.P. 58(a) and notice sent to parties pursuant to Mass. R. Civ.P. 77(d)

5/95 \$2,965.06 paid into Court.

3/95 18.0 Notice of appeal of Intervenor-def Michael J Markoff

3/95 19.0 Notice of appeal of Intervenor-def Steven V Murphy

3/95 20.0 Designation Pursuant to MARP 18(b) & Statement of Issues of deft/ Intervenor Michael J Markoff

COMMONWEALTH OF MASSACHUSETTS
 SUFFOLK SUPERIOR COURT
 PUBLIC CIVIL DOCKET & HISTORY

SUCV93-00977

As of 06/12/96

Hayes et al v Woods et al

Page 6

* * * D O C K E T * * *

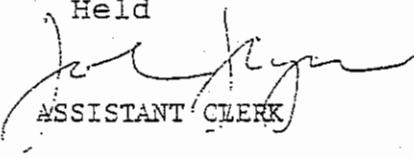
3 PAPER ENTRY

04/95 Notice to Justice David M Roseman of filing of notice of appeal
 04/95 Notice of service of notice of appeal to: Maureen E Curran, Esq,
 Thomas E kenney, Esq, Thomas E Peisch, Esq and Therese M
 LaRussa, Esq, of Messrs Conn, Kavanaugh, Rosenthal & Peisch and
 Eileen Ryan- McAuliffe, Esq
 30/95 Notice of Assembly of record on appeal
 05/95 \$2,964.58 paid into Court
 03/95 \$3041.46 paid into Court
 20/96 21.0 Motion of deft Dept of Revenue to dismiss appeals (with
 opposition)
 20/96 22.0 Opposition of intervenor defts to motion of deft Dept of Revenue
 to dismiss appeals & cross-motion of intervenor defts to enlarge
 time for filing appeal for ten days after the entry of this
 Court's Order deciding this motion (w/o opposition)
 18/96 (P#21) Accepting as to the intervenors statement that they did
 not receive the notice of assembly of the record until on or
 about April 26, 1996 - the court finds excusable neglect and
 shall deny this motion to dismiss appeal and shall enlarge time
 for docketing the appeal to June 10, 1996 (Smith Jr, Justice)
 Notice sent 5/29/96
 2/96 Notice of assembly of record on appeal

* * * C A L E N D A R * * *

COURT EVENT	EVENT STATUS	SES	SCH	DATE
2/94 ADR: screening conference	Opt out of ADR	D		04/22/94
1/94 CNFRNC: final pre-trial	Pltf did not appear	D		06/21/94
3/94 HRNG: Rule56 motion	Rescheduled	D		09/13/94
9/94 HRNG: Rule56 motion	Rescheduled	D		09/21/94
8/94 HRNG: Rule56 motion	Held	D		09/28/94

COPY ATTEST:


ASSISTANT CLERK

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK
THE SUPERIOR COURT

DOCKET# SUCV93-00977

RE: Hayes et al v Woods et al

TO: Eileen Ryan McAuliffe
Mass Revenue Dept
100 Cambridge Street
Room 808 - Legal Dept
Boston MA 02204

NOTICE OF DOCKET ENTRY

You are hereby notified that on 04/04/95 the following entry was made on the above referenced docket:

ORDER AND JUDGMENT Commissioner of Revenue's Motion for Summary Judgment is ALLOWED. There is no Massachusetts law cited to the Court on the question of the priority between a tax lien and an atty lien. The court determines that priority should be based on whichever lien arose first; here it is the tax lien. See Mass. G.L. c62C s 50(a) ("The lien shall arise at the time the assessment is made or deemed to be made and shall continue until the liability for the amount assessed deemed to be assessed is satisfied"). The tax lien arose before the services of the Intervenor-Deft Markoff and Murphy were engaged. Judgment is to enter declaring the priority of the Massachusetts Tax Lien SO ORDERED (Roseman,J) entered on docket pursuant to Mass. R. Civ.P. 58(a) and notice sent to parties pursuant to Mass. R. Civ.P. 77(d)

Dated: 4th day of April, 1995

Michael Joseph Donovan
Clerk of the Courts

BY:

James P. Kelly, Asst Clerk
Telephone: 617-725-8515

17

COMMONWEALTH OF MASSACHUSETTS

NOTICE SENT: 4-4-95

SUFFOLK, ss.

M.E.C.(C,K,R&P) E.R.M.(MRD)
T.E.K.(C,K,R&P) M.J.M.
T.E.P.(C,K,R&P)
(AC)

SUPERIOR COURT
CIVIL ACTION
NO. 93-00977D

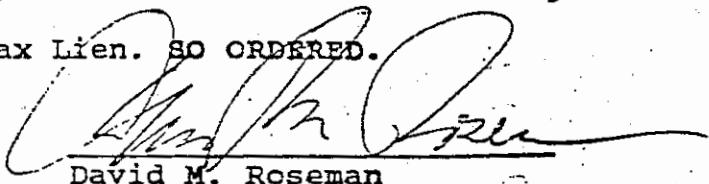
G. HOWARD HAYES¹ and Others²

vs.

PAUL J. WOODS³ and Others⁴

ORDER *Judgment*

Commissioner of Revenue's Motion for Summary Judgment is ALLOWED. There is no Massachusetts law cited to the court on the question of the priority between a tax lien and an attorney lien. The court determines that priority should be based on whichever lien arose first; here it is the tax lien. See Mass. G. L. c. 62C §50(a) ("The lien shall arise at the time the assessment is made or deemed to be made and shall continue until the liability for the amount assessed or deemed to be assessed is satisfied"). The tax lien arose before the services of the Intervenor-Defendant Markoff and Murphy were engaged. Judgment is to enter declaring the priority of the Massachusetts Tax Lien. so ORDERED.


David M. Roseman
Justice of the Superior Court

DATED: March 28, 1995

¹ Individually and as Trustee of the Mashpee Self-Storage Nominee Trust

² J. Bruce MacGregor; Roger P. Williams and G. Howard Hayes.

³ Individually and as Trustee of the Stephen-Pamela Realty Trust.

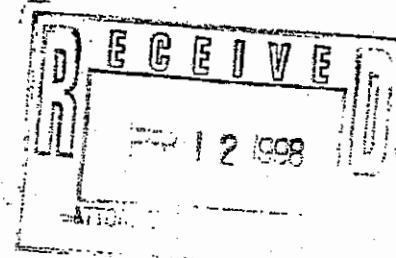
⁴ The United States; Department of Internal Revenue Service; Department of Revenue of the Commonwealth of Massachusetts.

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF SUFFOLK
THE SUPERIOR COURT

DOCKET# SUCV93-00977D

RE: Hayes et al v Woods et al

TO: Salvatore M Giorlandino
Mass Atty General's Office
200 Portland Street
Government Bureau/Trial Division
Boston MA 02114-1698



NOTICE OF DOCKET ENTRY

You are hereby notified that on 02/11/98 the following entry was made on the above referenced docket:

JUDGMENT FOR DEFTS AFTER RESCRIPT (PURSUANT TO MASS.R.A.P. 28)
That Mr. Murphy's lien has priority over the lien of Dept and is in an amount covering his fees and expenses, including the amount he incurred by retaining Mr. Markoff entered on docket pursuant to Mass R. Civ.P. 58(b) and notice sent to parties pursuant to Mass. P. Civ. P 77(d)

Dated: 11th day of February, 1998

Michael Joseph Donovan
Clerk of the Courts

BY:

(Unassigned)
Telephone: 617-725-8205

a/cp 1995

24

N.B. FOR CLERK'S USE ONLY

JUDGMENT ENTERED ON DOCKET February 11, 1998
PURSUANT TO MASS.R.CIV.P.58(b) AND NOTICE SENT
TO PARTIES PURSUANT TO MASS.R.CIV.P.77(d) AS FOLLOWS:

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTIONNo. 93-0977G. HOWARD HAYES ET ALs, Plaintiff(s)

v.

PAUL J. WOODS ET ALs, Defendant(s)JUDGMENT FOR DEFENDANT(S) AFTER RESCRIPT
(PURSUANT TO MASS.R.A.P.28)

This action was appealed to the *Appeals Court - ~~Supreme Judicial Court~~ - the issues having been duly heard and the Appeals Court having duly issued a rescript, it is ordered and adjudged:

THAT MR. MURPHY'S LIEN HAS PRIORITY OVER THE LIEN OF THE DEPARTMENT AND IS IN AN AMOUNT COVERING HIS FEES AND EXPENSES, INCLUDING THE AMOUNT HE INCURRED BY RETAINING MR. MARKOFF.

Dated at Boston, Massachusetts, this 10th day of February 1998.

MICHAEL JOSEPH DONOVAN, Clerk/Magistrate

By: Michael J. Donohue, Asst. Clerk

NOTICE TO PARTIES: PURSUANT TO MASS.R.A.P.26(c) A PARTY DESIRING COSTS SHALL STATE THEM IN AN ITEMIZED AND VERIFIED BILL OF COSTS, WHICH SHALL BE FILED WITH THE CLERK OF THIS COURT, WITH PROOF OF SERVICE, WITHIN FOURTEEN (14) DAYS AFTER ENTRY OF THIS JUDGMENT.

*Strike inapplicable words.

*TRUE COPY OF JUDGEMENT DULY ENTERED ON 2/11 1998

United States Court of Appeals
For the First Circuit

FILED
CLERK'S OFFICE

2005 MA 01 P 2:15

No. 05-1859

GMAC MORTGAGE CORPORATION,

Plaintiff, Appellee,

v.

JEFFREY L. BAYKO, SR., ET AL.,

Defendants.

U.S. DISTRICT COURT
DISTRICT OF MASS.
JUDGMENT

Before

Boudin, Chief Judge,
Campbell and Stahl, Senior Circuit Judges.

JUDGMENT

Entered: December 8, 2005

At the motion of the United States, this appeal is dismissed as moot. We deny the request for vacatur, a gesture of limited utility given the many District of Massachusetts decisions rejecting the position taken by the United States. In view of the new interpleader action by the plaintiff, we need not order the district court to adjudicate the claims of the remaining parties.

Dismissed.

By the Court:

Richard Cushing Donovan, Clerk.

MARGARET CARTER

By: _____
Chief Deputy Clerk.

[Cert. cc: Hon. George A. O'Toole, Jr. and Sarah A. Thornton, Clerk, U.S.D.C. of Massachusetts, cc: Rosen, Sullivan, Barnico, Hutter, Clark, Ms. Smith, Ms. Turanchik, Ms. McAuliffe and Ms. Ouimet-Rooke]

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT
C.A. 87-4722

44

GUARANTY FIRST TRUST CO.
Plaintiff

vs.

NORMAN J. PRAUGHT, et. al.,
Defendants

MEMORANDUM OF DECISION AND ORDER

This memorandum of decision and order relates to an interpleader action brought by plaintiff. This court issued a preliminary decision on May 31, 1989 and requested the parties submit briefs detailing their claims against the interpleaded funds as of June 10, 1989. A hearing was held on June 9, 1989 during which the requested briefs were submitted. At the hearing, counsel for plaintiff submitted a motion for attorneys fees.

Discussion

Attorney fees may be awarded to a disinterested stakeholder at the discretion of the trial judge where equity warrants the distribution. See Chemical Bank v. Richmull Associates, 666 F. Supp. 616 (1987). The plaintiff in the present action initiated these proceedings without an interest in the eventual outcome of the distribution; equity warrants the award of reasonable attorney's fees after the distribution of the federal and state liens.

Copyist →

Pursuant to this Court's previous order, the following distribution of funds is ordered in descending order of priority:

	<u>Tax Year</u>	<u>Amount</u>
1. United States	1980	\$ 7,940.63
2. United States	1981	23,251.82
3. United States	1982	7,471.35
4. Massachusetts	1983	3,389.04
5. United States	1983	14,273.44
6. Massachusetts	1980,81 & 82	8,331.36
7. J.A. Marino		10,100.00
8. C.D. Boiler Works		8,750.00
9. Premier Roofing		16,600.31
10 Pereira		11,571.23
11 Capital Glass Co.		2,433.37
12 Capital Bldg. Specialty		3,173.96

ORDER

It is hereby ORDERED that reasonable attorney's fees are to be awarded to the plaintiff. Plaintiff is ordered to prepare a Memorandum detailing its legal expenses incurred in this action.

It is further Ordered that plaintiff is to submit to this Court an up-to-date accounting of the disputed stake plus earned interest as of August 17, 1989. A hearing will be held at that time and distribution ordered pursuant to the above schedule. All parties are ordered to attend.

Robert J. Hallisey
Robert J. Hallisey
Justice of the Superior Court
7/3/89

Dated: , 1989

Entered: July 5, 1989